No. 173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

UNITED STATES OF AMERICA, EX REL. MORRIS L. MARCUS, AND MORRIS L. MARCUS IN HIS OWN BEHALF,

Petitioners,

v.

WILLIAM F. HESS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER.

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CITATIONS.

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Opinions Below.

The opinion of the district court denying motions for new trial and judgment n.o.v. (R. 346) is reported in 41 F. Supp. 197. The opinion of the circuit court of appeals (R. 471) is reported in 127 F. 2d 233.

Jurisdiction.

The judgment of the circuit court of appeals sought to be reviewed was entered on March 23, 1942 (R. 485). Petition for a writ of certiorari was filed June 23, 1942, and was granted October 12, 1942 (R. 546). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Respondents, through admittedly collusive bidding, secured contracts to perform work on municipally sponsored PWA projects. Their contracts, work, and claims were supervised and approved by Federal officers. They were paid, through the municipalities, with funds obtained from the Public Works Administration. The broad question here is whether respondents are liable to the United States for double damages and penalties on account of their fraud, under one or more of the first three clauses of R. S. sec. 5438. A question is therefore presented under each clause as follows:

1. *Liability under first clause of statute.*—Whether, in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a Federal officer and paid out of United States (PWA) funds is actionable under the first clause of R. S. sec. 5438 as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. *Liability under second clause.*—Whether the making and presentation by a defendant contractor of fraudulent claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not action-

able as against such contractor under the second clause of R. S. sec. 5438, which imposes liability upon "every person • • • who • • • makes, uses, or causes to be • • • used, any false • • • claim [or] certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States?

3. *Liability under third clause.*—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor—all in furtherance of an admitted conspiracy—is not actionable under the third clause of R. S. 5438 which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim" whether against the United States or against a third party, where the effect is to defraud the United States?

Statutes Involved.

Revised Statutes, sec. 5438:

> Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the

payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes sec. 3490:

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes secs. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R. S. sec. 3490, are printed in the Appendix.

Regulations under the PWA statutes also appear in the Appendix.

Statement.

On January 25, 1940, the petitioner on behalf of the United States and as well in his own behalf brought this action in the Western District of Pennsylvania against 52 defendants

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[1] Because R. S. sec. 3490 imposed liability only for acts in violation of the prohibitions specified in R. S. sec. 5438 in 1874—the date of the enactment of R. S. sec. 3490, the conduct and acts giving rise to a cause of action under R. S. sec. 3490 must be measured by the language of R. S. sec. 5438 as it originally read at the date of the enactment of R. S. sec. 3490 and not as later amended. *Olson* v. *Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U. S. 615.

While R. S. sec. 5438 was later amended (see 18 U. S. C. secs. 80, 83) the scope of R. S. sec. 3490 which incorporated it in the year 1874 remains intact and unaffected. *Kendall* v. *United States*, 12 Pet. 524, 625; *In re Heath*, 144 U. S. 92, 93, 94.

to recover the penalties and double damages, provided by R. S. sec. 3490, resulting from acts in furtherance of a conspiracy by defendants to defraud the United States in violation of R. S. sec. 5438.

The complaint charged that grants of money were made by the United States, through the Public Works Administration, to aid in the construction of numerous projects by municipalities and school districts (referred to as "sponsors") in and about the City of Pittsburgh (R. 10); that such sponsors advertised for bids for contracts for the performance of the electrical work involved in such projects (R. 10-11); and that the defendants, all members of the Electrical Contractors Association of Pittsburgh, Inc., thereupon conspired to defraud the United States (R. 11). It alleged that, in furtherance of, and pursuant to, the conspiracy, they engaged in sham and collusive bidding, falsely and fraudulently submitted bids, received awards and entered into contracts, submitted false and fraudulent claims for payment thereof, made false and fraudulent statements, and made false and fraudulent certificates knowing them to contain fraudulent or fictitious statements or entries (R. 14). The answer of defendants denied substantially all the allegations of the complaint (R. 33, 34, 35).

After a lengthy trial, the jury returned a verdict against all the defendants save one in the sum of $315,100.91, being $203,100.91 damages and $112,000 penalties (R. 338). Judgment was entered accordingly (R. 389). On motion for new trial (R. 341-346) the court entered an opinion and order overruling the motion (R. 346, 387). The circuit court of appeals, however, held that the statute authorizes recovery only when the defendants present a direct "claim upon or against the government of the United States or any department or officer thereof" (R. 475), and that the evidence failed to show that the defendants had made or presented

such a claim (R. 479). It entered judgment of reversal accordingly (R. 485).

The Facts.—As to each of the projects here involved, with unimportant variations, the evidence showed that the sponsor—that is, the municipality or school district—made application to the Federal Emergency Administration of Public Works for a grant (R. 82, 537; 44 C. F. R. 216.2-216.3[2]). An estimate of cost of the project, detailed according to each branch of the work, viz. general construction, heating, plumbing and electrical, was submitted on PWA Form 231 (R. 498). The grant was in each case made on what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The Public Works Administration addressed a formal offer to the sponsor incorporating the standard terms and conditions of PWA Form 230 (R. 157-179) by reference (R. 179-180, 497-498), and the latter by its acceptance created the Finance Agreement between the Government and the municipality (R. 116-117, 181-184; 44 C. F. R. 222.1).

The grant or agreement of the Public Works Administration was to pay 45% of the actual cost of the project but not in excess of a specified sum representing 45% of the estimated cost (R. 45, 88-89, 179).[3]

[2] The President, under the authority of Section 201(a) of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 200, delegated to the Federal Emergency Administrator of Public Works authority to prescribe rules and regulations (Executive Orders Nos. 6252, August 19, 1933, and 6929, December 26, 1934, 44 C. F. R. 201.1, 201.2 and 201.4). The regulations are collected in Title 44, Ch. II, of the Code of Federal Regulations. Those which are particularly pertinent are reprinted in the Appendix, *infra*.

[3] Of the 48 projects as to which the plaintiff claimed damages at the close of the trial, only two involved 30% limitation of the federal grant (R. 331). The Act of June 16, 1933, c. 90, Tit. II, Sec. 203 (a), 48 Stat. 195, 202, provided that "no such grant shall be in excess of 30 percentum of the cost of the labor and materials employed upon such project." The Work Relief and Public Works Appropriation Act of 1938, Joint Resolution of June 21, 1938, c. 554, Sec. 201 (d), 52 Stat. 809, 816, provided that "no grant shall be made in excess of 45 percentum of the cost of any non-Federal project."

After execution of the Finance Agreement between the Public Works Administration and the local municipality, the latter advertised for bids on the work (R. 43-44, 217). Each advertisement disclosed that the work was a Public Works Administration project (R. 43-44, 217). Attached to the successful bids of the defendant-contractors on substantially all projects involved herein were signed statements or certificates of non-collusive bidding (R. 225-226).[4] The contract documents, which included the certificatess of non-collusive bidding (R. 217, 225-226), were required to be, and were, submitted to PWA officers for approval (PWA Form 230, R. 165, 217, 495, 502).

Collusion in bidding.—As stated in the opinion of the circuit court of appeals (R. 472):

> The facts are not in dispute and may be simply stated. * * * The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on these projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the average amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market.

Thus both courts below recognized the collusion in bidding and the consequent fraud upon the United States.

The collusion and conspiracy to control bidding on PWA projects by the respondents and the Electrical Contractors'

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[4] Examination of the original exhibits certified to this Court by the clerk of the Circuit Court of Appeals indicates that of the 56 contracts involved, 48 were based on certificates or affidavits of non-collusion and five were without certificate of non-collusion. The contracts on the remaining three projects have not been forwarded to this Court.

Association of Pittsburgh, Inc., started in June, 1935. Two plans were devised. The first plan for controlling the bids was the so-called "Average Bid System". The members bidding on a project met before the bid opening date, compared their figures, and submitted the figures to Robert C. Carmack, who had been employed by the Association as its manager (Tr. 896-900).[5] Mr. Carmack received his instructions and orders from the President of the Association (Tr. 1160). Carmack would average the figures submitted to him, which would include the labor and material, job expenses, and other items of cost. If a bid was extremely low or high it would be thrown out and not used in the average (Tr. 902). After an average was struck, over-head and profit were added, depending upon the size of the job (Tr. 898). On jobs up to $20,000.00 a mark up of 20% over-head and 10% profit were added; on jobs over $20,000.00 the mark-up was 15% for the over-head and 10% for profit (Tr. 985-986, 990). This mark-up was added regardless of the over-head of any particular contractor (Tr. 1067). The member closest to the average bid was selected by the members to submit the successful bid. The other members would be assigned higher figures to submit as bids in order to protect the member selected for the successful bid (Tr. 899). This system continued for five or six months. Dissatisfaction arose amongst the members because some members struck the average too consistently and others were not getting any work (Tr. 900).

Another plan was then devised so that the work could be distributed more evenly. This second plan was the same as the first that is, by averaging the bids. However, the work was allocated according to volume. Under this plan,

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[5] References to "Tr." are to the portions of the original record constituting the record on appeal in the Circuit Court of Appeals and certified here by the clerk of that court, but not printed pursuant to stipulation of counsel (R. 546).

the members of the association were classified into four categories or brackets according to size and capacity to handle business: (1) Up to $3500; (2) $3500 to $15,000; (3) $15,000 to $40,000; (4) $40,000 and up. They bid in their respective classes (R. 900-901).

Under this second plan, if a job came within a certain bracket, the members within that bracket would submit their estimates to Carmack either by taking them to him or by telephone. Upon receipt of these estimates, Carmack would average them and then would consult the volume book (Exhibit 537), which contained the volume of business of each member of the Association (R. 919-920). By consulting the volume book, Carmack determined which contractor in that bracket had the least business. After determining the bid just as in the first plan, *supra*, the member lowest in volume in that bracket would be selected to submit the successful bid regardless of whether he had submitted a higher or a lower figure to Carmack (Tr. 903). The others would be given higher figures to submit as bids to the sponsors. These figures were given either verbally or on a small slip of paper (Exhibit 467A, Tr. 904-905).

As to the highest bracket, however, the members made their own decisions and prices. At the beginning of the plan they were handled in the same way as the others. However, they later effected their own plan. They met at various places and each member would bring in an estimate at a meeting. At a round table discussion, they would decide amongst themselves who was to get the contract and at what price. Although they handled the jobs themselves, Carmack attended the meetings once in a while and he would be given figures to submit to members outside of this large bracket (Tr. 1003).

This plan of collusion was used not only on PWA projects but on all jobs—private homes, churches, etc. (Tr. 911, 1166).

The members were compelled to pay monthly dues based on their monthly volume of business. In 1935, the amount of dues was ½ or ¾%; on April 1, 1936, the dues were raised to 1½% (Tr. 971-973). The dues were included in job expenses as part of the cost of the job. In other words, they were hidden in that item (Tr. 1142-1144, 1146).

The yearly volume of business done on the bidding plan of the Association was $1,500,000.00 (Tr. 1165).

If a member did not comply with the bidding plan, that is, if he bid independently of the other members, he was given a volume penalty. In other words, the volume of the amount of the job would be doubled against him which would slow him up in getting another job according to volume (Tr. 1234, 1313-1314).

Claims by the contractors.—As the work progressed in the cases here involved, the defendant-contractors were obliged to submit "Periodical Estimates for Partial Payment", PWA Form I-23 (R. 190, 202), for approval by the PWA Resident Engineer Inspector in order to obtain partial payment for the work performed during the preceding month.[6] Such estimates, and their approval by the PWA representative, were required by the Regulations (44 C. F. R. 237.8, 237.13), by the Finance Agreement of the sponsor with the Government (PWA Form 230, R. 174, 175-176), and by the terms of each contract (R. 119, 232, 234, 48, 59, 61-62, 64, 66, 112, 521, 536). Thereafter, the estimate was turned over to the sponsor for payment from the Construction Account (R. 41, 48, 64).

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[6] It may be noted that this PWA Form I-23, used for all claims submitted by the contractors, called special attention to the fact that claims against the United States were involved, by citing federal statutes punishing presentation of false claims against the United States (R. 190, 191; 202, 204).

The Construction Account.—The Finance Agreement of the United States with the municipality in each case provided, Part II, Par. 5 (R. 163):

> A separate account or accounts (herein collectively referred to as the "Construction Account") will be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, * * * Applicant's Funds [by definition the Applicant's share of the cost of the Project (R. 162)], the final grant payment and any other monies which shall be required in addition to the foregoing to pay the cost of constructing the Project will be deposited in the Construction Account promptly upon the receipt thereof. * * * Payments for the construction of the Project will be made only from the Construction Account.

The finance agreement also provided, Part II, Par. 6 (R. 163):

> Monies in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the government.

The same agreement also provided, Part II, Par. 1 (R. 161):

> If the Project to aid in the financing of which the government has made an advance grant, is abandoned, the unused advance grant proceeds will be returned to the government, but nothing herein shall be construed to waive any right which the government may have to the return of the entire advance grant if the applicant shall have acted in bad faith or made any misrepresentations concerning the completion of the Project or the use of the advance grant.

As pointed out above, under this agreement the municipality could properly make no payments to the contractors from the special Construction Account until the contrac-

tors' Periodical Estimates for Partial Payment had been duly certified by the officials of the municipality and approved by the PWA representative (PWA Form 230, R. 174, 175-176; R. 119, 48, 59, 61-62, 64, 66, 521, 536).

Requisitions by the municipalities.—Pursuant to the Regulations (44 C. F. R. 230.21-230.25), the Finance Agreement between the United States and the municipality provided that the government would pay for deposit in the specially established Construction Account 15% of the previously estimated cost on advance requisition by the sponsor after acceptance of the Government's offer, 10% upon a first intermediate requisition when the sponsor had deposited its share in the same account, 10% upon a second intermediate requisition submissible when the project was 50% completed and payable when the project was 70% completed, and 10% upon final requisition after completion of the project and final audit, but not in excess of 45% of the actual cost of the project "as determined by the Administrator" (PWA Form 230, R. 157, 160-163).

The requisitions or claims of the municipalities were required to be supported by the claims of the contractors, as "documents necessary to support such requisitions" (R. 162, 163). 44 C. F. R. 230.21. The terms and conditions of the Finance Agreement provided that the sponsor would require of the contractor and submit to the PWA representative, on forms supplied by the Government, "Periodical Estimates for Partial Payment" (R. 174). These periodical estimates were on the PWA Form I-23 above referred to, upon which the contractor in each instance made his monthly claim for payment (R. 202-207). When grant requisitions upon the United States were made by the sponsor, these monthly estimates were part of, and included in, the records audited by the PWA in determining how much of

the sponsor's requisition or claim against the United States was to be paid (R. 505-507, 528).[7]

Decision of the district court.—The trial court instructed the jury that there had been evidence of excessive contract prices for electrical work on 48 projects (R. 142-144) and submitted to the jury petitioners' tabulation of damages on these projects (R. 146, 331). In addition, the court instructed that there was evidence of collusion, without showing of actual damage on eight other projects, on each of which as in the case of the 48, a penalty of $2,000 was applicable (R. 144). The jury returned a verdict of $263,100.91 damages and $112,000 penalties (R. 338).

In its opinion overruling the motion for new trial, the trial court pointed out that there was in each case evidence as to two types of payments, each based on a particular type of claim, showing: (1) that the granted money was transferred from the United States Treasury to be deposited in the joint Construction Account only upon allowance of requisitions by the municipalities based on the

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[7] PWA auditors examined and audited the accounts and all costs pertaining to each project before each disbursement of moneys by the PWA under the grant, in order to determine items of cost proper to be included in computing the amount of the grant earned by the sponsor under its Finance Agreement (R. 53, 107, 522, 528, 529; 44 C. F. R. 202.22, 230.1, 230.2). And the regulations specified that, in reviewing the sponsor's requisition, the Regional Director should "compare the financial entries on the requisition with the project audit made by the division of accounts" (44 C. F. R. 230.24).

That the certificate of non-collusive bidding in the defendant's bid was regarded as material part of the documents considered in passing on the question of payment by the United States under the grant in each case is shown by the reconciliation sheet included in the part of the record brought here, for it shows a suspension of the claim of the City of McKeesport based on the contract of one of the defendants because of the alleged collusive bidding (R. 211, 215, 533). To increase the safeguard created by the contractors' assertion of non-collusion, the government later demanded that affidavits—rather than mere certificates of non-collusion—be furnished by the contractors (Tr. 427).

estimates submitted by the contractors to the sponsor and by it in turn submitted as supporting documents for its requisition on the Public Works Administration; and (2) that no payments could be made by the sponsor from federal funds in the Construction Account to the contractor without approval by the local PWA representative of the estimates submitted monthly by the contractor. The court said (R. 349):

> The money the Government agreed to contribute to these projects was paid out in the course of the carrying-out of these projects only on sworn estimates submitted by the contractor to the Administrator, and approved by him on Federal Form (1-23). The Federal funds allotted to each project were placed in a bank approved by the Administrator, which bank account contained also the funds of the local authority. This special fund was from time to time checked by a representative of the Administrator; and no payments could be made therefrom to the contractor doing the work, except with the approval of the Administrator, which approval was noted on Form I-23 above mentioned.

Decision of the circuit court of appeals.—The circuit court of appeals, although it recognized that "the government was • • • defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition" (R. 472), reversed on the ground that (R. 475, 479):

> The statutory language here important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or any department or officer thereof." • • •
>
> The claims of the defendants • • • were simply against the local municipalities. Since the defendants

had no claim upon or against the United States, this action was not authorized by the informer statutes.

Specification of Errors.

The circuit court of appeals erred:

1. In holding that a right of recovery was not established under the first clause of R. S. sec. 5438 which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

2. In holding that the only statutory language important in the case is that of the first clause of R. S. sec. 5438.

3. In failing to hold that a right of recovery was established under the second clause of R. S. sec. 5438 which makes liable "every person * * * who, for the purpose of obtaining or aiding to obtain the payment or approval of [any claim upon or aaginst the Government of the United States] makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

4. In failing to hold that a right of recovery was established under the third clause of R. S. sec. 5438 which makes liable "every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

5. In reversing the judgment of the district court.

Summary of Argument.

Revised Statutes sec. 3490 creates a right in the United States to recover double damages plus $2,000 penalty for each violation of R. S. sec. 5438. (Under R. S. secs. 3491, 3493, such suit therefor may be brought by any person as well for himself as for the United States, whereupon he becomes entitled to receive one-half the amount of damages and penalties recovered.)

1. Revised Statutes sec. 5438 prohibits the presentation for payment or approval to any person or officer in the service of the United States of a claim against the United States which is false, fictitious or fraudulent. The evidence in this case shows that respondents presented or caused to be presented to PWA officers periodic estimates, or claims for payment on their contracts with municipalities which had received grants-in-aid from the United States. These claims were in actual effect against the government of the United States because federal funds in the hands of each municipality were ear-marked as special funds held in trust for a specific purpose in a separate account and the approval of the federal officers was the last step necessary to obtain their release to the defendants. *Madden* v. *United States*, 80 F. (2) 672; *Roberts* v. *Calhoun County, Fla.*, 45 F. Supp. 291. The evidence further shows that the claims of the respondents were by them known to be fraudulent because they were based on contracts with municipalities for electrical work at prices and rates which were excessive as the result of continuous fraud incident to (1) concealment of a secret combination of substantially all electrical contractors in the Pittsburgh area, and (2) affirmative representations to each municipality of non-collusion.

2. The second clause of R. S. sec. 5438 is addressed, not to presentation of a fraudulent claim directly against the

United States but imposes sanctions against anyone who, for the purpose of aiding to obtain the payment or approval of a claim against the United States, "makes, uses, or causes to be made or used, any false bill * * * account, claim, certificate [or] affidavit * * * knowing the same to contain any fraudulent or fictitious statement or entry". Here it clearly appears that the municipalities for whom defendants contracted to perform work presented to the United States claims for payment which were, of necessity, based on defendants' claims for partial payment and certificates of non-collusion in bidding which they filed with the municipalities in connection with substantially all projects here involved. The defendants' periodic estimates or I-23 claims for progress or advance payments contained fraudulent representations in that they averred that work had been performed in accordance with the terms and conditions of the contract with the particular municipality. The fraud lay in the fact that bids were by the terms of the contract required to disclose all parties in interest with the bidder whereas defendants concealed the interests of their coconspirators in having the particular contract let at the excessive price fixed by the collusive bid in each case. Furthermore, the defendants' certificates of non-collusion filed by both the successful and unsuccessful bidders aided in obtaining the claim of the municipalities against the United States because they were relied upon by the examining and auditing officers of the United States in determining the amounts of further advances upon the requisitions of the several municipalities.

Under the second clause of R. S. sec. 5438 it is not essential that the formal documents of claim of the municipalities against the United States in this case be shown to be fraudulent. *Edgington* v. *United States*, 164 U. S. 361; *United States* v. *Jones*, 32 Fed. 482; but even if the statute were to be so construed, it is plain that the otherwise innocent

claims of the municipalities nevertheless included and relied upon the fraudulent estimates and certificates of noncollusion of the defendants and were, therefore, in that sense fraudulent, too. *Evans* v. *United States*, 11 F. (2d) 37. Since this was the natural result of their making of fraudulent claims, accounts, certificates and affidavits, the defendants are properly to be held to have made and used them "for the purpose of * * * aiding to obtain the payment" of the claim of the municipality against the United States. *United States* v. *Patten*, 226 U. S. 525.

3. Finally, conspiracy to defraud the United States by obtaining or aiding to obtain the payment or approval of any false or fraudulent claim—whether against the United States or another—falls within the ambit of the third clause of R. S. sec. 5438. Conspiracy by the defendants is conceded and the defrauding of the United States as a result is acknowledged by the circuit court of appeals. It is apparent that the means by which this was accomplished must be found either in the defendants' obtaining approval and payment of their fraudulent monthly I-23 claims by the local PWA resident engineer, or in the defendants' aiding the municipalities to obtain payment of their claims against the United States by fraudulent entries in defendants' I-23 claims and non-collusion certificates. On the evidence the verdict and judgment can be sustained on either ground under this third clause of the statute.

Argument.

Revised Statutes sec. 5438 standing alone is merely a criminal statute. But R. S. sec. 3490 incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R. S. sec. 5438, together with a civil penalty of $2,000 for each such violation. Origi-

nally adopted in 1863 when frauds against the Government were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigation as well as for the loss directly resulting from the fraud.* Cf. *Stockwell* v. *United States*, 13 Wall. 531, 547, 551; *Helvering* v. *Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the suggestion of the circuit court of appeals that the United States or the municipality in each case may bring suit for simple damage on account of fraud and be made "completely whole" (R. 479) ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the purpose of the statute.

The portions of R. S., sec. 5438, here relevant are the first three clauses proscribing three distinct offenses with reference, respectively, to "every person"—

> [1] who makes or causes to be made or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or
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> [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or

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* Revised Statutes sec. 5438 was derived from the Act of March 2, 1863, c. 67, secs. 1 and 3, 12 Stat. 696, 698; and R. S. sec. 3490 was derived from section 3 of the same act. In the respects here pertinent they are substantially identical with the language of their precursor. R. S. sec. 3490 is now inaccurately codified as 31 U. S. C. sec. 231.

> [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying (R. 475):

> The statutory language herein important authorizes recovery only where the defendants presented a "claim upon or against the government of the United States or officer thereof."

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been established. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

I.

The Claims of the Contractor on Each Project Were Claims Against the United States and Violated the First Clause of R. S. Sec. 5438.

The first clause of the statute, *supra*, contains three elements: (1) presentation of a claim for approval to "any person or officer in the service * * * of the United States", (2) which is a "claim upon or against the government of the United States" and (3) which is presented with knowledge that it is "false, fictitious, or fraudulent". By the acts of each contractor here in presenting his periodical estimates for payment (Form No. I-23; R. 190, 202) he brought himself within all three of these requirements of the first clause of the statute, as follows:

(1) It was not seriously questioned that the contractor in each case became, in the words of the statute, "one who

• • • presents or causes to be presented, for payment or approval, to or by any person or officer in the • • • service of the United States" a claim. PWA Form I-23 on which the contractor's claims were made in each case was headed "Federal Emergency Administration of Public Works" and entitled "Periodic Estimate for Partial Payment" (Ex. 107, R. 190-194; Ex. 245, R. 202-207). Each form I-23 contained a blank form of approval for signature by the Public Works Administration Engineer in Charge (R. 193-194, 207). This approval by a Federal officer was required by the regulations (44 C. F. R. 237.8, 237.13) and by the finance agreement of the municipality with the government (R. 174, 175-176). And in each case the form I-23 claim, when submitted by the contractor, was either presented or thus caused to be presented to the PWA Engineer Inspector for approval (R. 48, 66, 112, 537-538).

(2) The claim in each case was, in the words of the statute, a "claim upon or against the government of the United States." The claim was for payment out of monies in a trust fund in which the United States retained a property interest. The whole administrative procedure throughout displays the utmost solicitude that the moneys allocated by the United States should reach their intended destination and that the United States should not be defrauded in the exercise of its power to thus appropriate for the general welfare. As shown in the statement of facts above, the grant in each case was made by the United States only upon what PWA approved as the proper estimate of the cost of the project (R. 498-499, 500). The plans and specifications, prepared by the sponsors through their architects and engineers, were required to be and were submitted to PWA for approval (R. 530, 535-536, 537-538). The sponsor in advertising for bids plainly stated that a PWA project was involved (R. 217, 225). The grant payments by PWA were placed in a special, ear-marked Construction Account to-

gether with funds of the sponsors, and were subject to use solely for the construction of the particular project under the terms and conditions of the contract between PWA and the sponsor (R. 55-56, 61-62, 64, 89, 97, 99-100, 107, 509, 525). All plans and specifications, contract documents, performance of work, construction accounts, payrolls, and payments of money were supervised, regulated, and approved by PWA (R. 51, 74, 79, 80, 86, 111, 495, 502, 503, 529, 531, 535-536, 537-538).[9]

Thus the United States surrendered neither control over nor interest in the funds. All courts which have had to deal with related questions have recognized that, in the case of

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[9] In addition to the record here, the nature of the transaction has been set forth by the Secretary of the Treasury in an elaborate report—pursuant to Sen. Res. No. 150, 76th Cong., 1st Sess., 84 Cong. Rec. 7954-7955, respecting the financial operations of federal lending and spending agencies—of which the following excerpts are here pertinent (Sen. Doc. No. 172, 76th Cong., 3d Sess., v. 26, pt. 1, February 15, 1940):

> "Disbursement of funds is made by the Public Works Administration only after approval of a certificate of purposes setting forth the proposed use of the funds." (P. 274.) "A properly certified voucher is issued for each disbursement, after the project costs have been audited at the site of such project and such costs found to be in accord with the terms of the contractual arrangement. * * * The determination of loan and grant payments * * * requires that the Government have complete knowledge of all costs incurred for each project. * * * The scope of the audits includes an examination of all basic records supporting costs incurred in connection with each project * * * Among the important features covered by these audits are the determination of whether or not loan and grant funds are being expended in accordance with previously approved estimates, whether there has been compliance with Public Works Administration terms, conditions, and requirements, and the identification of any expenditures which may have been improperly made from the project funds or which may not be eligible for participation in the grant." (P. 275.) "All disbursements, other than administrative expense, are based upon contractual arrangements which have been checked and approved. The vouchers are thoroughly checked to ascertain if payments are correct, and the amount paid is dependent upon the result of an audit made at the site of the work and specific clearance by all interested divisions of the Public Works Administration. Only after that is it certified to the disbursing officer for payment." (P. 276.)

Federal grants in aid, the United States has retained an interest in the moneys.[10] In *Madden* v. *United States*, 80 F. (2d) 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees, title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the Federal goverment for the relief of unemployment even though disbursed by state agencies were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.

In *Langer* v. *United States*, 76 F. (2d) 817 (C. C. A. 8), the court said (p. 823):

> Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appel-

[10] The respondents in their brief in opposition to the petition for certiorari (p. 23) appear to view this agreement as a gift. While in a lay sense the municipality might be regarded as a donee, it is manifest that the terms of this arrangement recognize the engagements of the municipality as the consideration for the obligation of the United States to make the promised advances to the municipality and to permit them to be paid out by it.

lants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, it is money of the Reconstruction Finance Corporation.

See to the same effect *United States* v. *Harding*, 65 App. D. C. 161, 81 F. (2d) 563, 568. Whatever may have been the precise legal relation in those cases, in the present case it is clear that the United States definitely retained a property interest in the funds delivered to the municipalities until they were paid out to the claiming contractors. The chose in action of the municipality against the bank represented by the Construction Account became the trust res at least insofar as it included the funds transferred by the United States. The municipality, of course, was trustee.

As pointed out above, all payments made by the United States to the municipality were required to be "deposited in the Construction Account promptly upon the receipt thereof. * * * Payments for the construction of the Project will be made only from the Construction Account" (R. 163). Intent that the United States retain an interest in the special fund also appears from the provision (R. 161):

> If the project to aid in the financing of which the Government has made an advance grant is abandoned, the unused advance grant proceeds will be returned to the government.

Plainly, this is not the language of debtor and creditor. Rather it indicates recognition of continuing interest in the proceeds of the specific account.

Further, in accordance with the Regulations (44 C. F. R. 222.21) the Finance Agreement provided:

> Monies in the Construction Account will be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government (R. 163).

The municipality was required to make monthly payments to each construction contractor—

> on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month (R. 176).

The required approval was in each instance given by the PWA Resident Engineer Inspector, as shown above.

It is thus apparent that, from the moment they were received, the municipality held the Government funds for the special purpose and under the duty to use them, not for its general requirements, but only to pay the claims of contractors and others for work on the project and those only if and when they had been approved by the Resident Engineer Inspector of the PWA. To the extent that monies received from the United States were not needed for that purpose, there was a duty to return them to the United States unless outstanding bonds were at the date of completion held by the United States, in which case the Finance Agreement directed specifically that the unused balance be used to repurchase bonds or placed in the bond fund (R. 163-164).

It seems plain that the United States retained an equitable property interest in the Construction Account and that the municipality held title thereto as a trustee.

McKee v. *Laimon*, 159 U. S. 317, 322; *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 206 Fed. 663, 665; *Roberts* v. *Calhoun County, Fla.*, 45 F. Supp. 291, 293. In submitting its monthly claim for allowance by the PWA Resident Engineer Inspector, therefore, the defendant contractor in each instance knew that it was by this action inducing the last step necessary to complete the relinquishment by the United States of its control over its moneys on deposit in the Construction Account. This is all that any claim against the United States can do.

It is not necessary that the claim be formally addressed to the United States. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States, so long as it involves a claim against, or in derogation of, the pecuniary or property right of the United States. See *United States* v. *Mercur Corporation*, 83 F. (2d) 178, cert. denied 299 U. S. 576.

(3) The claims of the contractors on their Form I-23 estimates were made by them "knowing such claim to be false, fictitious, or fraudulent" within the meaning of the first clause of the statute. There is plainly no merit in the attenuated theory that the fraud of the respondents ended in each case with the obtaining of the contract and that the subsequent periodic claims, because they were strictly in accordance with the then secured and existing written contracts, were not fraudulent. (See Resps' Br. in Opp. to Petition, p. 22.)

The initial fraud in the inducement of the contract lies in the implied representations that each bidder is acting in competition and not in combination with the others, *Hyer* v. *Richmond Ttaction Company*, 168 U. S. 471, 477 and that the sum bid is not in truth an unreasonable sum for the work to be done. *McMullen* v. *Hoffman*, 174 U. S.

639, 647. The applicable rule is set forth in 3 Restatement, Torts, sec. 535:

> One who deals with another in a business transaction or induces another to deal with a third person knowing that the other is relying upon the maker's misrepresentation previously made to induce the other to act in another and earlier transaction is subject to the same liability as though the maker had repeated the representation for the purpose of influencing the recipient's conduct in the later transaction.

In *United States* v. *Coggin*, 3 Fed. 492 (C. C. E. D. Wis.) the defendant, indicted under R. S. sec. 5438, contended that, while his initial procuring of a government pension certificate was by fraudulent affidavit, nevertheless prosecution for that fraud was barred by the statute of limitations and the subsequent collection of pension moneys under this genuine certificate involved no fraud. Rejecting this contention, almost identical with that advanced by respondents, the court said (p. 495):

> In this case it was not the entry upon the pension roll, nor the certificate issued, that was false or fraudulent. That was all genuine and authentic. The certificate issued was a genuine, true certificate, declaring that the defendant was entitled to a pension, but the claim was fraudulent. That certificate had been obtained, according to the indictment, by fraud, and when it was presented, as the indictment alleges it was, to the pension agent at Milwaukee, it constituted a false and fraudulent claim against the United States, and upon that false and fraudulent claim he obtained money, although the certificate was genuine.

It seems plain here that the fraudulent intent and acts of the respondents were directed, not so much at the mere obtaining of a contract with the United States—that was but an incident—but rather were directed to obtaining pay-

ment of claims in an amount determined at an excessive figure as a direct result of their fraud. Cf. *United States* v. *Newton*, 48 Fed. 218, 220-221. Pertinent here is the holding of the Circuit Court of Appeals for the Ninth Circuit in applying this same statute in *Dimmick* v. *United States*, 116 Fed. 825, 828:

> The character of the claim—that is to say, whether true, genuine, and honest, or false, fictitious, and fraudulent—must be determined in view of all of the facts and circumstances attending it. If it be originally forged, or otherwise fraudulently concocted, its presentation for payment with knowledge of the facts must necessarily be fictitious and fraudulent.

Manifestly fraud and misrepresentation may induce not merely the formation of a contract but also some performance under it. 2 Restatement, Contracts, sec. 476, *com. a.* Under established principles, therefore, it seems clear that the claims made for payment under the contract were, equally with the means by which the contract itself was obtained, stamped with fraud.

Since all three elements of the first clause of R. S. sec. 5438 are established by the evidence to have been present in this case, the court below erred in holding that no violation of that clause of R. S. sec. 5438 was shown.

II.

The Evidence Clearly Required a Verdict for the Plaintiff under the Second Clause of the Statute.

The provisions of R. S. sec. 5438 evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any de-

partment or officer thereof, knowing such claim to be false, fictitious or fraudulent". The second clause, however, relates to anyone who, (a) for the purpose of "*aiding to obtain*" the payment or approval of (b) a claim against the United States or any department or officer thereof, (c) "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement on entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States* v. *Coggin*, 3 Fed. 492, 495; and see *United States* v. *Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R. S. sec. 5438 were clearly established. The evidence showed that, in furtherance of the conspiracy, claims and certificates were made to the municipalities and thus caused to be used in turn by the municipalities in aid and support of the latters' claims against the United States for payment under the federal grants, as follows:

(1) Each of the "periodical estimates for partial payment" submitted by the several defendants on PWA Form I-23 clearly was a "false bill * * * voucher, account [or] claim" known by the claimant to contain a "fraudulent * * * statement or entry".

(2) Also, each of the certificates of non-collusion attached to bids on substantially all the projects was, within the meaning of the second clause, a "false certificate" known by the contractor to contain a "fraudulent or fictitious statement or entry".

Both the false "claim" and false "certificates" were made by the defendants and caused by them to be used by the municipalities in turn, within the meaning of the second clause, "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States by the municipality in each case. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The municipality in each case—upon the contractors' certificates and claims—made requisitions upon the United States for moneys to be deposited in the Construction Account (R. 160-162). There surely can be no denial that these requisitions were claims against the United States. And it is equally clear that these requisitions were, within the meaning of the statute, "aided" by the "certificates" and "claims" (Form I-23) of the contractors. Similarly in the words of the statute, each defendant was one who "causes to be * * * used" such certificates and claims. The violation of the second clause may be traced in detail as follows:

1. *The defendants' fraudulent and fictitious Form I-23 certificates aided the obtaining of the municipalities' claims against the United States.*—The requisitions were, it may be repeated, based on work done in part by the defendant contractor on each project. In determining what portion of the amount claimed in the requisition of the municipality should be paid, auditors for the PWA audited the accounts of the municipality pertaining to the project and, in so doing, reviewed and took into account the contractors' fraud-

ulent Form I-23 monthly estimates or claims for payment as part of the basis of the claim of the municipality against the United States (44 C. F. R. 202.22; R. 53, 107, 505, 505-506, 507, 522, 528, 529). The audit in each case showed the monthly estimates of the contractors (R. 53) and, under the regulations, was also used by the Regional Director in passing on the financial entries in the requisition of the sponsoring municipality (44 C. F. R. 230.24). By the same regulation it was provided that the Executive Officer in Washington in making a final review was to make a check against "all pertinent project records", which obviously would include in each case the original contract with its false certificate of non-collusive bidding.[11]

The Form I-23 estimates contained fraudulent and fictitious entries. Each of the "Periodical Estimates for Partial Payment" filed by the contractors contained the statement (R. 192, 205):

> All work has been performed and materials supplied in full accordance with the terms and conditions of the corresponding construction contract documents.

Included in the contract, however, and constituting part of the "Contract Documents" was the "Instructions to Bidders" (R. 275). This contained the provision (R. 219, 220):

> The proposal shall be signed by the bidder or bidders with his or their business address, and shall contain the full names of all persons interested with him or them.

In no case did the proposal contain the names of any of the other conspiring contractors (R. 225-226).

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[11] These were duly published regulations as to which defendants are charged with knowledge, since they have the force of law. *United States v. Grimaud*, 220 U. S. 506, 517-521; *Hampton & Co. v. United States*, 276 U. S. 394, 409.

It seems plain, therefore, that each of these "Periodical Estimates for Partial Payment" included a statement that the work and materials had been supplied in accordance with a contract in which no persons other than the particular contractor had an interest. That this was "fictitious and fraudulent" is apparent, *for all of the other participants in the conspiracy were interested in the obtaining and completion of each contract.* As shown above, as the volume of business of the single contractor increased, so proportionately did the chances of the others to obtain a contract increase since subsequent contracts were awarded to the one having the smallest volume (Tr. 903, 919-920). Each contractor is admitted to have been a member of the Electrical Contractors Association, Inc. (R. 6, 33). The monthly dues of this association—fixed at a proportion of the volume of business of the member—increased from ½ per cent in 1935 to 1½ per cent in 1936 (Tr. 971-974). The amount of these dues was hidden and included in job expenses (Tr. 1142-1144, 1146) as one of the elements of the bid (Tr. 902). The result was to force the awarding municipality to subsidize the association. All its members thus had a direct monetary interest in the bid which in each case was by agreement fixed by adding to the average bid a mark-up of 10 per cent for profit and 15 or 20 per cent for overhead (Tr. 898, 1067).

Furthermore, since all these defenders were doing business in the Pittsburgh area, it is obvious that each was heavily interested in all of the collusive bids made, successful and unsuccessful. With respect to the collusive bids on any given project it is plain that the contractor selected to make the low bid had an interest in the other bids since—as representations of the individual bidders' bona fide estimates of a fair price for the work to be done—they tended to created in the minds of the officials of the awarding

authority the impression that the low bid was not unreasonable.

It is also equally plain that each member of the conspiracy was particularly interested in the successful low bid. It contained an arbitrary loading of either 25% to 30% but as the low bid it tended to create a higher standard of values in the community and so to make it easier for each of the conspirators—when by collusion later selected to make the "low" bid on another project—to obtain approval of his equally excessive bid. In *McMullen* v. *Hoffman*, 174 U. S. 639, 646, this Court, speaking of a similar arrangement, noted as its direct tendency—

> Most clearly that it tends to induce the belief that there is really competition between the parties making the different bids, although the truth is that there is no such competition, and that they are in fact united in interest. It would also tend to the belief on the part of the committee receiving the bids that a bona fide bidder, seeking to obtain the contract, regarded the price he named, although much higher than the lowest bid, as a fair one for the purpose of enabling him to realize reasonable profits from its performance. *A bid thus made amounts to a representation that the sum bid is not in truth an unreasonable or too great a sum for the work to be done.* We do not mean it is a warranty to that effect or anything of the kind, but simply that a committee receiving such a bid and assuming it to be a bona fide bid would naturally regard it as a representation that the work to be done, with a fair profit, would, in the opinion of the bidder, cost the amount bid. *Hence it would almost certainly tend to the belief that the lower bid was not an unreasonably high one, and that it would be unnecessary and improper to reject all the bids and advertise for a new letting.* The fact that there were other bids even higher * * * does not alter the tendency of the agreement when carried into effect, to create or to strengthen the belief on the part of the committee in

> the fact of an active competition and the bona fide character of that competition, and that the lowest bid would be in all probability a reasonable one. It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. (Emphasis supplied.)

The same statement or entry in the Form I-23 estimates was fraudulent for another reason in all instances where a certificate of non-collusion was included in the contract documents as part of the bid proposal (R. 225-226, 275). In such instances, the statement in each I-23 periodic estimate that work had been performed "in full accord with the terms and conditions of the contract documents" could not be other than false and fraudulent, since non-collusion was one of the "terms and conditions" in the "contract documents." The variance was obviously material since the rates at which work was charged were much higher than they would otherwise have been.

Finally, it is apparent that the whole account contained in each periodic estimate was a fraudulent entry. Based as they were upon figures which were originally fixed at an excessive level through fraud in the bidding, it is apparent that the periodic progress accounts were but an essential step toward the ultimate goal of the fraud. "It may be affirmed as a principle of law based upon common sense, founded upon reason, and supported by authority that a false pretense which has ultimately accomplished its purpose of fraudulently obtaining money or other property will follow and taint with such fraud every step in the transaction, from its inception to its conclusion, however circuitous its route, or however many agencies it may use." *State* v. *Lynn*, 3 Penn. 316, 333-334 (Del.), 51 A. 878, 883. See pp. 26-28, *supra*.

2. *The false non-collusion certificates aided the obtaining of payment and approval of the claims of the municipalities.*—As stated above, the defendants' contracts were based on fraudulent bidding. Included in the bids was a certificate by the bidder that

> this Proposal is genuine and not sham or collusive or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder. (R. 226.)

The successful bid, including the false certificate, was made part of the contract (R. 217-276, 226). Each contract, including the false certificate of the bidder, was submitted to, and initially approved by, the Regional Director for PWA (R. 217).

The Regulations of the Federal Emergency Administrator of Public Works provided that the subsequent requisitions of the municipalities (that is, the claims which respondents purposed to aid in obtaining) should be forwarded to the Executive Officer at Washington, where they "will be subjected to a final review and to a check against all of the pertinent project records" (44 C. F. R. 230.24, see Pet. App'x., pp. 30-31). As pointed out above, note 10, respondents are charged with knowledge of this regulation.

The form of Finance Agreement between the United States and the municipality specifically provided that five copies of all executed contract documents be furnished to the PWA before any work was done thereunder (R. 165). It cannot be seriously contended that these construction

contracts, most of which embodied the certificate of non-collusion of the contractor, would be other than highly pertinent in determining the propriety of payments to the municipalities on their intermediate and final requisitions to cover the cost of construction. The certificate of non-collusion was obviously well-calculated to allay any suspicion which might otherwise arise as to the existence of collusive bidding since the sanctions attaching to its falsification must be deemed by any public official to be a definite deterrent. Regardless of their ultimate effect in a particular case, these certificates of non-collusion must be regarded as manifesting a purpose on the part of respondents that they should have their obvious consequence, i. e., aiding to obtain the payment or approval of the claim of the municipality against the United States.

3. *The requisitions of the municipalities were claims against the United States contemplated by the second clause of the statute.*—The phrase "such claims" in the second clause of the statute, by ordinary grammatical construction, refers back only to "any claim upon or against the Government of the United States or any department or officer thereof". Falsity or fiction or fraud in the formal document of claim against the United States is not an essential element of the act penalized in this second clause. It is enough that the supporting "bill, receipt • • • account, claim, certificate" contain a fraudulent or fictitious statement or entry. *United States* v. *Jones*, 32 Fed. 482, 483 (S. C. 1887); *United States* v. *Ingraham*, 49 Fed. 155, 156 (R. I. 1892) aff'd 155 U. S. 434, 437; *Bridgman* v. *United States*, 140 Fed. 577, 589 (C. C. A. 9, 1905). Contra: *United States* v. *Jennison*, 26 Fed. Cas. No. 15,475 at 609 (C. C. Kan. 1874); *United States* v. *Miskell*, 15 Fed. 369, 370 (C. C. Ky. 1883). This Court, on the only occasion on which it has spoken directly

on the subject, *Edgington* v. *United States*, 164 U. S. 361 (1896) said (p. 362):

> Section 5438 of the Revised Statutes makes it penal to make or cause to be made, for the purpose of obtaining or aiding to obtain payment or approval of *any claim against the United States*, any false deposition, knowing the same to contain any fraudulent or fictitious statement. (Emphasis supplied.)

Under this plainly correct reading of the statute, it is irrelevant whether the claims made by the municipalities in their formal documents of requisition upon the United States are properly to be regarded as "fraudulent" or not.

Furthermore, even if the statute were to be construed as requiring that the formal claim of the municipality against the United States be in each case fraudulent, it is not improper to conclude that, since the fraudulent representations made in the Form I-23 claims and in the certificates of non-collusion form part of the supporting fact basis upon which the inflated demands of the municipalities were paid by the United States, the claim of the municipality in each case is to be regarded as a fraudulent claim within the meaning of the second clause.

Claims against the Government invariably and necessarily consist of statements of fact in connection with demands for payment; and it would be a perversion of language to say that the fraudulent I-23 estimates which support the demands of the municipalities and the fraudulent non-collusion certificates which with them formed part of the basis upon which those demands were paid by the United States do not constitute the demands of the municipalities a false claim within the meaning of the statute. *Evans* v. *United States*, 11 F. (2d) 37, 39. The character of the claims of the municipalities—that is to say, whether true, genuine,

and honest, or false, fictitious and fraudulent—must be determined in view of all of the facts and circumstances attending them. *Dimmick* v. *United States*, 116 Fed. 825, 828; cf. *United States* v. *Downey*, 257 Fed. 366, 368. The fraudulent representations of the respondents, as they come to the United States in support of and to some degree as part of the municipalities' demands, are still actively fraudulent. Moreover, to construe the second clause of the statute as covering these facts is merely to read it as adopting the principles recognized at common law.[12]

It is, therefore, submitted that, within the fair intendment of the statute, the claims of the municipalities against the United States were fraudulent claims so far as these defendants are concerned.

4. *Defendants' acts were "for the purpose" penalized by the statute.*—Finally, it must, of necessity, be concluded that the fraudulent Form I-23 claims and the false certificates of non-collusion of the contractors were by them "made," "used," and "caused to be used" "for the purpose of * * * aiding to obtain the payment or approval" of the requisitions of the municipalities upon the United States. For it is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States* v. *Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 243.

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[12] *People* v. *Hoffman*, 142 Mich. 531, 544; *People* v. *Genet*, 19 Hun. 91 aff'd 83 N. Y. 436, 452, 453. In 3 Restatement, Torts, sec. 533, *com. d*, with respect to representations to rating companies, it is pointed out:

> The fact that the rating company does not communicate the figures misstated by the maker of the misrepresentations is immaterial. It is enough that their substance is summarized with reasonable accuracy or that the rating given expresses the effect of the misstatements made.

Accordingly, the evidence clearly brings the defendants within the language of the second clause of R. S. sec. 5438 imposing liability upon any one "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [against the United States] makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry." In failing even to consider whether a cause of action had been established under this plainly pertinent language of the second clause of R. S. sec. 5438, the court below violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *McDonald* v. *Thompson*, 305 U. S. 263, 266.

III.

The Allegations of the Complaint and the Evidence Clearly Showed Violation of the Third Clause of the Statute.

Conspiracy in the form of collusive bidding, the purpose of which was accomplished by the obtaining of the moneys of the United States, is shown, admitted, and expressly found by both courts below. Furthermore, the opinion of the circuit court of appeals acknowledges that, by the acts of the defendants, "the government was • • • defrauded in that it was compelled to contribute more for electrical work on the projects than it would have been required to pay had there been free competition" (R. 472).

The third clause of R. S. sec. 5438 is directed at any form of joint action "to defraud the Government of the United States" in any manner through false or fraudulent claims. It evinces further the basic Congressional intention to assure that the statute would embrace every possible type

of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to claims "against the United States". The third clause embraces "any false or fraudulent claim". Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded. The conspiracy provision was deliberately left general so that the—

> false and forged claims in any of the thousand modes by which it may be done * * * could be punished. (47 Cong. Globe, Part II, p. 954.)

And no reason appears why the situation here presented does not fall within this more general clause. Conspiracy was the gravamen of the complaint here (R. 11-14) and the case was submitted to the jury upon instructions having special reference to conspiracy (R. 133-134, 137-140).

Furthermore, even if this claim be held to require that the claims whose payment or allowance is the means of accomplishing the conspiracy must be claims against the United States, it is apparent from what has been shown above that the defendants are charged with knowledge of the procedure upon claims by municipalities on grants by the federal government adequate to sustain the verdict that they did conspire to defraud the United States by obtaining and aiding to obtain the payment and allowance of claims against the United States. See pp. 20-28, 30-38, *supra*. Yet the court below wholly ignored this third clause of the statute, upon which the complaint and verdict were obviously based.

Conclusion.

The tangible and pecuniary fraud upon the United States consummated by the claims here involved—whether regarded as falling within the first, second, or third clauses of R. S. sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to Federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at Pittsburgh, where a fraud involving federal funds results in either instance.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States* v. *Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be reversed.

Respectfully submitted,

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APPENDIX.

Revised Statutes.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.

Code of Federal Regulations.

Title 44—Public Property and Works.

Chapter II—Federal Emergency Administration of Public Works.

Section 201.1 Appointment of Administrator. Pursuant to the authority of "An act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other

purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof; I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

201.2 Delegation of functions and powers. (a) Pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200; 40 U. S. C. 401), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(1) To establish such agencies, to accept and utilize such voluntary and uncompensated services, and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary, and to prescribe their authorities, duties, responsibilities and tenure.

(2) Under the conditions prescribed in section 203 of said Act (48 Stat. 202; 40 U. S. C. 403), to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202 of said Act (48 Stat. 201; 40 U. S. C. 402); upon such terms as he shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project; to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project and to lease any such property with or without the privilege of purchase; and to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities.

* * * * * * *

201.4 Delegation of additional functions and powers. By virtue of and pursuant to the authority vested in me by section 201 (a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to

as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

(a) In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act (48 Stat. 202; 40 U. S. C. 403) and of title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, 48 Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

(b) To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

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202.22 Auditors and engineer inspectors. PWA auditors examine and audit the accounts pertaining to such projects. PWA engineer inspectors observe the construction of PWA projects and make reports concerning the same.

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216.2 Requirements relative to applications. All applications for financial aid must be in writing and must be prepared and submitted on forms and in accordance with instructions issued and distributed from time to time by PWA through its authorized field representatives. For further information, prospective applicants for financial aid should consult the PWA Regional Director of the region in which the prospective applicant is located.

216.3 Examination of applications. Applications for financial aid are examined, in the first instance, by the Regional

Director's Office. Thereafter, the Regional Director transmits the applications to the Central Office with appropriate engineering, finance, legal and other reports and recommendations. The Central Office then conducts further examinations of the applications and the Directors of the appropriate Divisions in the Central Office as well as other designated PWA employees make any necessary additional reports and recommendations pertinent thereto. All such reports and recommendations are merely advisory to the Administrator. The foregoing is only a general outline of the existing procedure in such matters. The procedure may vary from time to time in order to comply with applicable new Congressional enactments and Executive orders, in which event detailed instructions will be issued and distributed by PWA through its authorized representatives. For further information in regard to these matters, prospective applicants should consult the Regional Director of the region in which they are located.

* * * * * * *

222.1 General Summary of finance agreement. The finance agreement, to which the United States of America and the applicant are parties, consists of an offer on the part of the Government and the applicant's acceptance thereof. Such agreement contains the terms and conditions upon which the Government offers to make a loan and grant, a loan only or a grant only, as the case may be. It describes the project briefly and states the amount of the loan and grant, the loan only or the grant only, as the case may be. In the case of a loan and grant or a loan only, it also sets forth the method of making the loan, the type and denomination of the security which the Government agrees to purchase, the interest rate, the place of payment, registration privileges and maturities.

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222.20 Construction account. The applicant must establish a separate account or accounts (herein collectively referred to as the "Construction Account") in a bank or banks which are members of the Federal Deposit Insurance Corporation. The advance grant payment, the intermediate

grant payments, the proceeds from the sale of the bonds (exclusive of accrued interest), applicant's funds, the final grant payment and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the project must be deposited in the Construction Account promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of any bonds must be paid into a separate account (herein referred to as the "Bond Fund"). Payments for the construction of the project must be made only from the Construction Account.

222.21 Disbursement of moneys in Construction Account. Moneys in the Construction Account must be expended only for such purposes as shall have been previously specified in a signed certificate of purposes filed with and accepted by the Government. After all costs incurred in connection with the project have been paid, if any bonds are then held by the Government, all moneys remaining in the Construction Account must be used in repurchase bonds or must be transferred to the Bond Fund.

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230.1 Grant base. The grant base will be that administratively determined portion of the project costs which is used to compute the grant earned by the applicant. On a PWA non-Federal NIRA project the grant base will depend upon the cost of only the labor and the materials employed upon the project. On other PWA non-Federal projects the grant base will depend upon the cost of the project.

230.2 Computation. The computation of the grant base will be made by auditing all costs incurred by the applicant in constructing the approved project and then selecting those items of costs which are administratively determined to be eligible for inclusion in the grant base. With certain restrictions and exceptions, the cost of equipment which is called for by the finance agreement as a permanent part of the project will be includable in the grant base.

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230.21 Purpose. A grant requisition consists of a public voucher and certain supporting documents which must be prepared by the applicant for the purpose of obtaining a payment on account of the grant.

230.22 Kinds. Grant requisitions on PWA non-Federal NIRA projects are known as "advance", "partial", "intermediate", "semi-final", "final", and "supplemental final". Grant requisitions on * * * PWA non-Federal projects are known as "advance", "intermediate", "semi-final", "final", and "supplemental final".

230.23 Submission. An advance grant requisition may be submitted immediately after the PWA finance agreement has been entered into. The payment of an advance grant is entirely optional with the Administrator. Partial, intermediate and semi-final grant requisitions may be submitted at specified times during the course of construction of the project. The final grant requisition may be submitted only after the project is entirely completed and all project costs are known. Supplemental final grant requisitions are used when necessary to adjust the grant account.

230.24 Review. When the applicant has prepared a grant requisition in the required number of copies, together with the supporting documents, the applicant must deliver it to the engineer inspector assigned to the project. The engineer inspector will review it for completeness, eligibility for payment as affected by the physical condition of the project, compliance with the PWA finance agreement and the established policies of PWA. On completion of his review the engineer inspector will submit the requisition with his recommendations to the Regional Director who will give due consideration to the recommendations of the engineer inspector and will compare the financial entries on the requisition with the project audit made by the Division of Accounts. The Regional Director will then submit the requisition with his recommendations to the Executive Officer of PWA at Washington, where it will be subjected to a final review and to a check against all of the pertinent project records.

230.25 Payment. After a grant requisition has been finally cleared and the amount of the earned grant has been administratively determined at the Washington Office of PWA, payment on account of the grant will be made to the applicant by means of a warrant on the Treasury of the United States of America.

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237.8 Construction reports. The owner must require that there shall be submitted to it by each construction contractor and must, in turn, submit to the Administrator's authorized representative or agent, schedules of the costs and quantities of materials and of other items which schedules shall be in such form and shall be supported as to correctness by such of the estimates upon which they are based as such representative or agent may require. The owner must also require that there shall be submitted to it by each such contractor, and must, in turn, submit as above-stated, the following records on forms to be supplied by the Government: Detailed Estimate, and Periodical Estimates for Partial Payment.

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237.13 Payment. Not later than the 15th day of each calendar month, the owner must make partial payment to each construction contractor on the basis of a duly certified and approved estimate of the work performed during the preceding calendar month by the particular contractor, but must retain at least 10 percent of the amount of each such estimate until final completion and acceptance of all work covered by the particular contract. The owner must require that each such contractor shall pay: for all transportation and utility services not later than the 20th day of the calendar month following that in which such services are rendered; for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, not later than the 20th day of the calendar month following that in which such materials, tools, and equipment are delivered at the site of the project, and the balance of the cost thereof not later than the 30th day following the com-

pletion of that part of the work in or on which such materials, tools, and equipment are incorporated or used; and to each of his construction subcontractors, not later than the 5th day following each payment to such contractor, the respective amounts allowed such contractor on account of the work performed by such subcontractors, to the extent of each such subcontractor's interest therein.